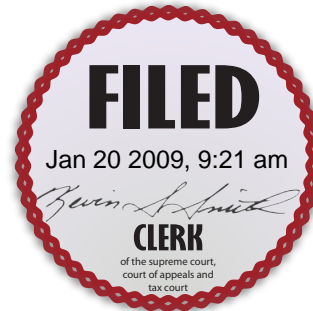


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

DAVID ROUSE,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 24A04-0806-CR-374

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable J. Steven Cox, Judge
Cause No. 24C01-0612-FC-820

January 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a jury trial, David Rouse was convicted of criminal recklessness, a Class C felony. For our review on appeal, Rouse raises the following issue: whether the trial court properly instructed the jury on accomplice liability. Concluding that there was no reversible error in the trial court's instructions to the jury, we affirm.

Facts and Procedural History

The night of December 21, 2006, Bill and Donna Monroe hosted a Christmas party at their home for employees of Donna's business. The employees were all girls aged sixteen to twenty. The girls brought alcohol with them, and planned to spend the night with the Monroes. One of the girls invited Rouse to the party; when he arrived late in the evening, he brought alcohol with him and had already been drinking. Rouse was wearing a white baseball cap when he arrived at the party. Bill asked Rouse to give him the keys to his truck because Rouse had been drinking and Bill did not want him to drive. When Rouse refused, the two exchanged words and their altercation culminated in Bill slapping Rouse. Rouse then left the party, telling Bill, "I'll get you old man. I know where you live." Transcript at 111. Shortly after Rouse left, Bill, Donna, and the girls turned in for the night.

Prior to going to the Monroes' house, Rouse had been watching a football game at his friend Justin Farrow's house with Farrow and Sterling May. Rouse returned to Farrow's after leaving the party and told Farrow that he had argued with the homeowner at a party and the homeowner had hit him, embarrassing him in front of the girls. Rouse, Farrow, and May got in Farrow's car to return to the Monroe home and settle Rouse's

score with Bill. While en route, the men realized that there was a shotgun in the car, and Rouse decided that instead of calling Bill out to fight, he would shoot the gun into the air to scare him. Rouse loaded the shotgun on the way to the Monroes' house. Farrow stopped the car where Rouse instructed him to, and Rouse exited the car, shooting the gun in the direction of the mailbox, the garage, and the house. Rouse returned to the car and the men left the area.

Bill heard a loud vehicle pull up to his house and then heard gunfire. Bill looked out the window and although he was unable to see the vehicle, he thought it was the truck Rouse had been driving earlier because it sounded the same. Bill saw a man wearing a white hat standing near the driveway. When the shooting stopped and the vehicle left, Bill called 911. The 911 dispatch initially identified the suspect as a "David Graf" and advised officers to be on the lookout for a red and gray pickup truck. Tr. at 25. Shortly after hearing the 911 dispatch, Brookville Police Officer Brent Campbell observed Farrow's car run a stop sign in the general area of the Monroes' house and initiated a traffic stop. Farrow immediately admitted having a shotgun in the car, but claimed that they had been out "spotlighting." Id. at 196. Officer Campbell knew Farrow and Rouse. After talking with them briefly, Officer Campbell let them leave, as he was looking for a red and gray pickup truck driven by "David Graf."

Franklin County Deputy Sheriff John Roberts responded to the scene and observed several bullet holes in the Monroes' house, including into a bedroom where four of the girls were sleeping. While Deputy Roberts was interviewing the witnesses, one of the girls corrected Donna when she identified Rouse as "David Graf." Deputy

Roberts put out a new dispatch identifying the suspect as Rouse. Deputy Roberts recovered bullets, shells, and wadding from the scene. Several days after the incident, Deputy Roberts recovered the same brand of shotgun shells from Farrow's vehicle.

Rouse was eventually arrested and charged with criminal recklessness, a Class C felony. A jury found Rouse guilty as charged, and this appeal ensued.

Discussion and Decision

I. Standard of Review

The manner of instructing the jury lies within the discretion of the trial court. Filice v. State, 886 N.E.2d 24, 37 (Ind. Ct. App. 2008), trans. denied. The giving of an instruction will not be an abuse of discretion unless the instructions taken as a whole misstate the law or otherwise mislead the jury. Id. In reviewing a trial court's decision to give an instruction, we consider: 1) whether the instruction correctly states the law, 2) whether there is evidence in the record to support giving the instruction, and 3) whether the substance of the tendered instruction is covered by other instructions which were given. Bell v. State, 820 N.E.2d 1279, 1283 (Ind. Ct. App. 2005), trans. denied. To be entitled to reversal, the defendant must show that an instructional error prejudiced his substantial rights. Stringer v. State, 853 N.E.2d 543, 548 (Ind. Ct. App. 2006). "Errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the instruction would not likely have impacted the jury's verdict." Ray v. State, 846 N.E.2d 1064, 1070 (Ind. Ct. App. 2006), trans. denied.

II. Accomplice Liability Instruction

The trial court instructed the jury as follows:

A person may be charged as a principal yet convicted as an accomplice.

A person who knowingly or intentionally aids, induces, or causes another person to commit an offense commits that offense, even if the other person:

- (1) Has not been prosecuted for the offense;
- (2) Has not been convicted of the offense; or
- (3) Has been acquitted of the offense.

Appendix of Defendant-Appellant at 73, 77. Rouse does not contend that the instructions misstate the law¹ or that the substance of the instructions is covered by other instructions. Rather, Rouse contends that the trial court abused its discretion because the evidence did not support giving these instructions.

Under the theory of accomplice liability, an individual who aids, induces, or causes the commission of a crime is equally as culpable as the person who actually commits the offense. Ind. Code § 35-41-2-4. Accomplice liability is not a separate crime, but merely a separate basis of liability for the crime that is charged. Hampton v. State, 719 N.E.2d 803, 807 (Ind. 1999). Therefore, when the circumstances of the case raise a reasonable inference that the defendant acted as an accomplice, it is appropriate to instruct the jury on accomplice liability even where the defendant was charged as a principal. Id. However, it is error to give instructions that are not applicable to the

¹ Peterson v. State, 699 N.E.2d 701, 706 (Ind. Ct. App. 1998), held the same instruction was “misleading” because it “draws the focus of the jury away from the total circumstances showing the defendant’s knowledge and conduct” and fails to instruct the jury “that accomplice liability requires proof that the defendant engaged in voluntary conduct in concert with his accomplice” and stated the Indiana pattern jury instruction on accomplice liability should be used instead. However, Rouse did not object to the instruction on the basis that it was an incorrect statement of the law and any argument to that effect would therefore be waived on appeal. See Gentry v. State, 835 N.E.2d 569, 576 (Ind. Ct. App. 2005) (holding that defendant’s assertion of error in instruction was waived because he did not object at trial on the specific grounds raised on appeal).

evidence adduced at trial. Jacobs v. State, 640 N.E.2d 61, 66 (Ind. Ct. App. 1994), trans. denied.

Even though the State did not mention accomplice liability in its opening statement or closing argument, the evidence adduced at trial shows that Rouse was not alone at the Monroes' house when the shots were fired. Farrow drove Rouse and May to the Monroes' house and owned the shotgun used to shoot at the house. Therefore, we cannot say there is no evidence that would support an accomplice liability instruction. Even if Rouse is correct that there was no evidence to support an accomplice liability instruction, however, he cannot establish substantial harm or substantial potential for harm due to the giving of the instruction because the evidence was sufficient to convict him as a principal. Multiple witnesses testified they heard Rouse threaten Bill when he left the party; Bill identified the shooter as wearing a hat similar to the hat Rouse had been wearing earlier; and Farrow testified that while he was driving Rouse to the house, Rouse decided to shoot the gun to scare Bill, and when they arrived, Rouse exited the car with the shotgun, shot five shots toward a house he knew to be occupied, and got back in the car. See Ind. Code § 35-42-2-2 (defining Class C felony criminal recklessness as recklessly, knowingly, or intentionally performing an act that creates a substantial risk of bodily injury to another person by shooting a firearm into an inhabited dwelling). Under these circumstances, even if the accomplice liability instructions were erroneously given, it was harmless error. See Williams v. State, 891 N.E.2d 621, 630 (Ind. Ct. App. 2008) (“[E]rrors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found

otherwise.”); see also Penn Harris Madison Sch. Corp. v. Howard, 861 N.E.2d 1190, 1197 (Ind. 2007) (“[W]here an instruction presents a correct statement of law, but no evidence supports it, the objecting party is generally unharmed by the instruction.”).

Conclusion

There was evidence supporting the giving of the accomplice liability instructions and Rouse did not show harm in the giving of the instructions. His conviction is therefore affirmed.

Affirmed.

CRONE, J., and BROWN, J., concur.